

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| In the Matter of |) | |
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| |) | |
| Rules and Regulations Implementing the |) | CG Docket No. 02-278 |
| Telephone Consumer Protection Act of 1991 |) | |
| |) | |

PETITION FOR RECONSIDERATION

Proximity Marketing (“Proximity”), by counsel, hereby requests the Commission to reconsider certain parts of the *Report and Order* and amended rules and policies adopted in this proceeding concerning unsolicited facsimile advertising.¹

PROCEDURAL STATUS

On August 6, 2003, Proximity filed a Request for Expedited Clarification and a Request for Stay of the *Report and Order*. By *Order on Reconsideration*, FCC 03-208, released August 18, 2003, the Commission, on its own motion, issued a limited reconsideration of the *Report and Order* extending “until January 1, 2005, the effective date of the Commission’s determination that an established business relationship will no longer be sufficient to show that an individual or business has given express permission to receive unsolicited facsimile advertisements” and the effective date of amended rule 47 C.F.R. Section 64.1200(a)(3)(i). As part of the *Order on Reconsideration*, the Commission dismissed without prejudice Proximity’s Request for Stay. However, the Commission did not address Proximity’s Request for Expedited Clarification, which remains pending.

¹ See *Report and Order, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC 03-153, released July 3, 2003. A summary of the *Report and Order* was published in the Federal Register on July 25, 2003, 68 FR 44144, making petitions for reconsideration due August 25, 2003. This Petition is, therefore, timely filed.

The Commission's *Order on Reconsideration* mooted the need for action on Proximity's Request for Expedited Clarification prior to the effective date of the *Report and Order*. However, the issues raised in Proximity's Request for Expedited Clarification remain pertinent to the eventual implementation of the *Report and Order* and amended Rule 64.1200(a)(3)(i). Thus, Proximity hereby incorporates by reference in this Petition its Request for Expedited Clarification.

INTRODUCTION

Proximity is an independent marketing company that specializes in developing and coordinating fax, e-mail and web-based communications campaigns for the magazine publishing market. A significant number of Proximity's clients are the publishers of Requester Publications. In general, these are specialized trade or business publications provided at no charge to subscribers that have demographic characteristics indicating that they have an interest in the publication's subject matter.² Proximity's services to clients include magazine circulation renewal programs, editorial survey programs, directories and buyer's guide updates, and marketing and promotion campaigns. Proximity Marketing is a small business under SBA guidelines.

The *Report and Order* and the new rules and policies adopted therein implement the Telephone Consumer Protection Act of 1991 ("TCPA").³ In the *Report and Order*, the Commission reversed its prior determination that companies having an established business relationship possess the requisite consent to send faxes to their customers or clients, and adopted amended Section 64.1200(a)(3)(i) to require the sender of a facsimile advertisement to have

² A more detailed description of the Requester Publication industry is contained in Proximity's Request for Expedited Clarification at pages 3-6.

³ Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. Section 227.

signed written consent from the recipient of the fax authorizing its transmission. These changes, if ultimately implemented, represent a significant departure from Commission policy in effect for more than ten years, and would radically alter the regulatory landscape for the business use of facsimile transmissions.⁴

The Commission's policy reversal raised the key question posed in Proximity's Request for Expedited Clarification: Does a faxed communication from a publisher to the subscriber of a Requester Publication (who receives a free subscription), asking the subscriber to confirm his or her desire to continue receiving the publication free of charge, constitute an unsolicited facsimile advertisement under the TCPA? This question (to which Proximity shows that the answer is "no"), and the need for a better explanation of the type of content that does and does not constitute an "advertisement" under the TCPA, remain germane, and the Commission should provide the clarification requested by Proximity on reconsideration of the *Report and Order*. However, beyond the issue of what is or is not an advertisement, there are broader concerns about the *Report and Order* not addressed in Proximity's Request for Expedited Clarification that the Commission also must address.

DISCUSSION

The TCPA prohibits only the transmission of "an unsolicited advertisement to a telephone facsimile machine."⁵ The TCPA does not prohibit other faxed communications. Under the TCPA, an "unsolicited advertisement" is "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person

⁴ The Commission adopted its current rules and policies implementing the TCPA in 1992. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752 (1992) (1992 TCPA Order).

⁵ 47 U.S.C. Section 227(b)(1)(C).

without that person's prior express invitation or permission.”⁶ The Commission has adopted the same definition.⁷

In its *1992 TCPA Order*, the Commission determined “that [a] facsimile transmission from persons or entities that have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient” (hereafter “EBR presumption”).⁸ The Commission reversed this determination in the *Report and Order* and eliminated the EBR presumption. Noting that the TCPA requires the prior express permission or invitation of the recipient before a facsimile advertisement may be sent, the Commission concluded, “express invitation or permission must be in writing and include the recipient's signature.”⁹

In reversing course, the Commission provided no explanation why its prior policy was no longer appropriate, nor how its new requirement for signed, written consent is necessary in the public interest or how it complies with the TCPA's requirements. Although the Commission discussed, in general terms, the harms associated with unsolicited facsimile advertising that violates TCPA requirements, and Congress' general concerns in adopting the unsolicited facsimile advertising restrictions, the Commission did not explain why its prior policy was no

⁶ 47 U.S.C. Section 227(a)(4).

⁷ 47 C.F.R. Section 64.1200(f)(10), as amended in the *Report and Order*.

⁸ *Report and Order* at para. 185, citing *1992 TCPA Order*, 7 FCC Rcd at 8779, para. 54. n. 87. The EBR presumption is not an “exemption” to the TCPA, as some have suggested. *See e.g.*, Opposition to Petition for Stay of Proximity Marketing, filed August 8, 2003, by Joe Shields; Opposition to Petition for Stay of American Business Media, filed by Robert Biggerstaff. As the Commission noted in its *1992 TCPA Order*, it is without authority to create an exemption from the statute. 7 FCC Rcd at 8779, para. 54, n. 87. However, the Commission does have authority to determine the circumstances under which the permission or invitation required under the TCPA is deemed given. Thus, in 1992 the Commission determined that an established business relationship created a presumption that permission or an invitation to receive facsimile advertising existed.

⁹ *Report and Order* at para. 187. The term “signature” includes an electronic or digital form of signature to the extent it is recognized as a valid signature under applicable federal or state law. *Ibid.* at n. 691.

longer adequate to effectuate the TCPA. For example, the Commission did not explain, analyze or discuss the extent to which faxes that fall under the EBR presumption, are the type of faxes that consumers and businesses believe they have neither solicited nor given their permission to receive.¹⁰ Are these concerns related to facsimiles subject to the EBR presumption, or do they pertain to truly unsolicited facsimile advertisements, where no established business relationship exists? If there is no established business relationship, the faxes already are prohibited and the Commission's rule and policy changes will have no impact.

The Commission also fails to explain how its amended rule and policy comport with TCPA requirements. In announcing the changes the Commission focused on Congress' determination that companies that wish to fax unsolicited advertisements must obtain their customer's "express permission."¹¹ However, the Commission's focus on a requirement for "express permission" mischaracterizes the actual TCPA requirement for "express invitation or permission."¹² The Commission undertakes no analysis of what Congress intended when it required "express invitation or permission." For example, does this mean "express invitation" or "express permission", or does the term "express" modify only "invitation?" If the latter, then "permission" could be either express or implied. In either case, what is the difference between an invitation and permission? The Commission does not discuss these key issues.

¹⁰ See e.g., *Report and Order* at para. 189. For example, one party recently reported having received more than 400 unsolicited facsimile advertisements on 14 facsimile machines, which apparently includes facsimile advertisements that are within the EBR presumption and others that are outside the EBR presumption. See *Opposition to Petition for Stay of Proximity Marketing*, filed August 8, 2003, by Joe Shields. To the extent the faxes complained of are outside the EBR presumption, they already violate the TCPA. The changes in the Commission's rules and policies will have no impact on such activities.

¹¹ See e.g., *Report and Order* at para. 191, citing 47 U.S.C. Sections 227(b)(1)(C) and (a)(4).

¹² Other examples of the Commission's focus on "express permission" appear at *Report and Order*, para. 189.

This is particularly critical, as the Commission has adopted a stringent rule that is neither required under, nor consistent with the plain meaning of the TCPA's requirements. Although Congress could have, it did not require written, signed consent from the recipient of a facsimile advertisement. Express invitation or permission can be conveyed in any number of ways other than a signed written authorization and still comply with the TCPA. While a signed, written statement from the recipient is evidence of an express invitation or permission, it is not the only way an express invitation or permission can be conveyed.

For example, many publishers of Requester Publications, when notifying their subscribers of a soon to expire subscription, provide a form that the subscriber may complete to continue to receive the free subscription. These forms usually request the subscriber to provide his or her name, facsimile number, and signature (in addition to other information). By voluntarily providing their fax number to the publisher, the subscriber understands that the publisher may fax information, including advertising,¹³ and has communicated their willingness to receive facsimile communications. If a subscriber does not wish to receive faxed communications all they need do is not provide their fax number.¹⁴

Publishers also contact some subscribers by telephone to inform them of their expiring subscriptions and to inquire if they want to renew. In the course of these telephone conversations a person may provide their fax number in order to receive facsimile communications from the publisher, which can include advertising. This too is an "expressed"

¹³ Although containing the subscriber's name, fax number and signature, these subscription renewal forms do not include all the information required under the Commission's amended rule.

¹⁴ Proximity believes that most if not all reputable publishers do not fax materials to persons who do not provide their fax number or indicate they do not want to receive faxed communications. To the extent a party sends a facsimile communication which is contrary to the recipient's desires, it would violate the TCPA as the recipient has not indicated their consent to receive the facsimile communication.

invitation or permission for the publisher to send facsimile materials which would satisfy the plain meaning of the TCPA. In this context, the bigger concern may be how the publisher can “prove” that the subscriber has provided his or her verbal consent should a question later arise. One option, which many publishers have been using, is to obtain a “personal identifier” from the subscriber to confirm the recipient’s information.¹⁵

Publishers also use e-mail and Internet communications to obtain subscription renewals. These communications similarly request the subscriber to provide, among other information, his or her name, facsimile number, and a personal identifier. As with the foregoing examples, if the subscriber voluntarily provides their facsimile number, it demonstrates his or her willingness to receive facsimile communications from the publisher. Indeed, the Commission has acknowledged that an electronic or digital signature will suffice if it is recognized under applicable federal or state law.¹⁶ An electronic or digital signature can take many forms, including “an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.”¹⁷ Thus, something as simple as an exchange of e-mails or clicking a mouse on an Internet website could be all that is required to constitute an electronic signature.

In each of these examples, the subscriber has expressed a willingness to receive facsimile communications that satisfies the plain meaning of the TCPA. In general, these procedures already are in place for most if not all publishers of Requester Publications. If they are not, they

¹⁵ Magazine publishing audit bureaus (such as BPA International and the Audit Bureau of Circulations) require personal identifiers as a means to verify a request from a subscriber where a signature is not practical. A personal identifier could be the recipient’s birth date or month, mother’s maiden name, or any other unique personal information that can be provided, in addition to the recipient’s subscription information and fax number.

¹⁶ *Report and Order*, para. 187, n. 691.

are relatively simple to implement. This contrasts with a massive communications and record-keeping undertaking to contact every subscriber to obtain the signed, written consent mandated in the Commission's new rule.¹⁸

If this requirement remains in place, there are significant questions how a company can obtain such written consent. The most efficient means to obtain such authorizations may be by facsimile communications. However, it is unclear whether the Commission believes this is permissible. The Commission has stated, "facsimile requests for permission to transmit faxed ads, including toll-free opt-out numbers, impose unacceptable costs on the recipients. This kind of 'negative option' is contrary to the statutory requirement for prior express permission or invitation."¹⁹ However, a facsimile communication asking for permission to send facsimile advertising and requiring the recipient to affirmatively respond, is not itself advertising and on its face does not violate the TCPA.²⁰ Nor does it constitute a "negative option." Indeed, if the recipient of such an inquiry fails to respond, or responds in the negative, then the party sending the inquiry will not have obtained the required permission or invitation and would not be authorized to send facsimile advertising. Thus, if the Commission retains the signed, written consent requirement, it should clarify that facsimile inquiries seeking such permission or invitation, provided they are not a negative option, are permitted.

Other ambiguities in the types of communications that constitute advertising under the TCPA further complicate matters.²¹ If a party is uncertain whether (a) its facsimile

¹⁷ See Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001(a); Uniform Electronic Transactions Act Section 7(d).

¹⁸ See amended Section 64.1200(a)(3)(i).

¹⁹ *Report and Order* at para. 193.

²⁰ Compare *ee e.g.*, Proximity's Request for Expedited Clarification at pages 9-11.

²¹ See *e.g.*, Proximity's Request for Expedited Clarification showing why faxed communications concerning the renewal of a free Requester Publication subscription do not come within the

communication constitutes advertising, or (b) it already has the requisite express invitation or permission to send the facsimile to the recipient, it will likely want or need to obtain a signed, written authorization under amended Section 64.1200(a)(3)(i). This is not an insignificant matter, despite the Commission's suggestion to the contrary.²² Moreover, a Commission failure to clarify that facsimile communications may be used to obtain such authorizations, would significantly increase the burden. For example, there are about 4,000 Requester Publications, each having anywhere from 15,000 to 250,000 subscribers. Publishers would need to obtain tens or hundreds of millions of individual written authorizations from their subscribers under the new rule.

This process would be repeated throughout virtually every industry or business sector that uses facsimile communications. While the Commission belatedly recognized the breadth of this problem in its limited reconsideration of the *Report and Order*,²³ it cannot ignore this fact in reconsidering the appropriateness of its rule and policy changes. The Office of Advocacy, U.S. Small Business Administration, has demonstrated that the "do-not-fax" portion of the *Report and Order* does not comply with the Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996.²⁴ The Office of Advocacy points out, among other things, that not only did the Commission fail to address the significant costs the rule

TCPA's and Commission's definition of "unsolicited advertising." Other parties that requested a stay of the *Report and Order* raised similar issues for other types of faxed communications. Proximity expects this also will be a focus of other petitions for reconsideration.

²² "We believe that even small businesses may easily obtain permission from existing customers who agree to receive faxed advertising, when customers patronize their stores or provide their contact information." *Report and Order*, para. 191.

²³ *Order on Reconsideration*, para. 5.

²⁴ See Letter dated August 14, 2003, from Thomas M. Sullivan, Chief Counsel for Advocacy and Eric E. Menge, Assistant Chief Counsel for Telecommunications, Office of Advocacy, U.S. Small Business Administration, to Commission Chairman Michael K. Powell.

would impose, but it also failed to consider alternatives that would minimize these costs.²⁵ What makes these failures even more egregious is that the Commission recognized that such harm will occur, but neglected to analyze the extent of the harm and its impact on those affected, particularly small businesses.²⁶ Moreover, alternatives to the Commission's plan exist and, as described above, are either already in place (at least in the case of the Requester Publication industry), or far simpler to implement than the Commission's new rule.

CONCLUSION

The Commission needs to reconsider the actions it has taken with respect to implementation of the unsolicited facsimile advertising provisions of the TCPA. The *Report and Order* offers neither a reasoned explanation for the Commission's elimination of the EBR presumption, nor an explanation why its adoption of a signed, written consent requirement is necessary and how it complies with the requirements of the TCPA. Assuming the Commission can demonstrate that changing policy direction is necessary, and that eliminating the EBR presumption is appropriate, it nevertheless must revise amended Section 64.1200(a)(3)(i). In its place the Commission should provide that express invitation or permission to the transmission of facsimile advertising exists when a person voluntarily provides his or her facsimile number along with verification, either in the form of a written or electronic signature, or a personal verifier in the case of telephone communications, to the party transmitting the facsimile where the parties have an established business relationship.

²⁵ *Ibid* at p. 4.

²⁶ *See Report and Order*, Appendix B (Final Regulatory Flexibility Analysis) at para. 37.

Respectfully submitted,

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